

IN THE  
SUPREME COURT OF THE UNITED STATES

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JOSEPHINE BANKS,

*Petitioner,*

v.

WAFFLE HOUSE, INC.,

*Respondent.*

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On Petition for a Writ of Certiorari  
to the Supreme Court of Georgia

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**BRIEF IN OPPOSITION TO PETITION  
FOR A WRIT OF CERTIORARI**

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**QUESTION PRESENTED**

Although the Petitioner presented a question that reflects her dissatisfaction with the sound and correct rulings of the Georgia Court of Appeals (which the Supreme Court of Georgia declined to review on a Petition for a Writ of Certiorari), the Respondent asserts that the only question before this Court is whether the Petition for a Writ of Certiorari sets forth any basis for this Court's exercise of certiorari jurisdiction.

The question presented by the Petitioner is:

"When a lower court overlooks a required legal document that is in the record, fails to correct their error and proceeds to deny a litigant the right to an appeal, how can this denial of due process be remedied?"

## **CORPORATE DISCLOSURE STATEMENT**

Respondent Waffle House, Inc. has no parent corporation, and no publicly held company owns 10 percent or more of its stock.

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### **RELATED PROCEEDINGS**

The directly related proceedings are:

1. State Court of Gwinnett County, Georgia, *Josephine Banks v. Waffle House, Inc.*, No. 15-C-06239-3 (August 27, 2018) (Order granting summary judgment).
2. Court of Appeals of the State of Georgia, *Josephine Banks v. Waffle House, Inc.*, No. A19A1594 (Order dismissing appeal for lack of jurisdiction entered March 26, 2019; Order denying Appellant's Motion for Reconsideration entered April 18, 2019; Order denying Appellant's Request for Permission to File Second Motion for Reconsideration entered May 22, 2019).
3. Supreme Court of Georgia, *Josephine Banks v. Waffle House, Inc.*, No. S20T0274 (October 3, 2019) (Order denying request for extension of time to file a Petition for Writ of Certiorari).

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The Order of the State Court of Gwinnett County, Georgia, granting Respondent Waffle House, Inc.'s Motion for Summary Judgment and dismissing the case was not reported and is reproduced at Respondent's Appendix "E."

The Order of the Court of Appeals of Georgia dismissing Petitioner's appeal for lack of jurisdiction as untimely was not reported and is reproduced at Respondent's Appendix "D." The Georgia Court of Appeals' subsequent Orders denying Petitioner's Motion for Reconsideration and denying Petitioner's Motion for Permission to File Second Motion for Reconsideration were not reported and are reproduced at Respondent's Appendix "C" and Appendix "B," respectively.

The Order of the Supreme Court of Georgia denying Petitioner's request for extension of time to file a Petition for Writ of Certiorari was not reported and is reproduced at Respondent's Appendix "A."

## **STATEMENT OF JURISDICTION**

The Order of the Supreme Court of Georgia denying Petitioner's request for an extension of time to file a Petition for Writ of Certiorari was entered on October 3, 2019. (Respondent's Appendix ("Resp. App.") A.) On February 19, 2020, Justice Thomas extended the time for filing Petitioner's Petition for a Writ of Certiorari to and including March 1, 2020.

Petitioner appears to invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1257(a), as Petitioner alleges a deprivation of her right to appeal without due process of law under the Constitution of the United States. However, the purported federal question was not raised in the state court proceedings and was raised for the first time in the Petition for a Writ of Certiorari to this Court. Accordingly, this Court lacks jurisdiction to review the Order of the Supreme Court of Georgia on a writ of certiorari under 28 U.S.C. § 1257(a).

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## **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

Although Petitioner alleges that this case involves the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States, this case does not present a question of federal law.

## STATEMENT OF THE CASE

This personal injury action arises out of a hot coffee spill that occurred outside of a Waffle House restaurant, inside Petitioner Josephine Banks' vehicle, after a failed exchange of a cup of coffee between Petitioner and Petitioner's daughter. Specifically, Petitioner's daughter removed and failed to re-secure the lid to Petitioner's cup of coffee before handing it to Petitioner, which caused the coffee to splash onto Petitioner's hand and Petitioner to release her cup of coffee into her lap. (Resp. App. F, 7a–14a). Petitioner filed a Complaint against Respondent Waffle House, Inc. in the State Court of Gwinnett County, Georgia, alleging state-law claims for negligence, negligence per se, and statutory attorney's fees pursuant to O.C.G.A. § 13-6-11. (Resp. App. F, 6a–7a).

Respondent moved for summary judgment, arguing Petitioner failed to present any evidence establishing that Respondent breached its duty to use reasonable care while serving Petitioner's cup of coffee and that any alleged negligence of Respondent proximately caused Petitioner's burn injury. (Resp. App. F, 14a–18a). On August 27, 2018, following a hearing, the Gwinnett County State Court granted Respondent's Motion for Summary Judgment and entered final judgment against Petitioner. (Resp. App. E, 5a). The state court concluded that the "evidence was plain, palpable and undisputed as to the lack of negligence on the part of [Respondent] Waffle House, Inc." (Resp. App. E, 5a).

On September 27, 2018, thirty-one (31) days after the entry of final judgment, Petitioner filed a Notice of Appeal. (Resp. App. D, 4a). On March 26, 2019, the

Court of Appeals of Georgia dismissed Petitioner’s appeal for lack of jurisdiction, finding that Petitioner’s Notice of Appeal was untimely. (Resp. App. D, 4a).

Petitioner filed a Motion for Reconsideration, arguing that a letter Petitioner mailed to the Gwinnett County State Court Clerk on September 11, 2018 (the “Letter”) constituted a valid, timely Notice of Appeal, and, therefore, the Georgia Court of Appeals had jurisdiction to hear the appeal. (Resp. App. G, 30a–33a). In support of her Motion for Reconsideration, Petitioner cited O.C.G.A. § 5-6-38(a), which provides that a “notice of appeal shall be filed within 30 days after entry of the appealable decision or judgment complained of,” as well as Georgia case law holding that the timely filing of a notice of appeal is an absolute requirement to conferring the appellate court’s jurisdiction to hear a case. (Resp. App. G, 30a–33a). Petitioner did not invoke any federal law or allege any denial of due process of law. (See Resp. App. G).

In response to Petitioner’s Motion for Reconsideration, Respondent argued that the Georgia Court of Appeals was unable to consider the Letter as a Notice of Appeal under Georgia law because, in the six (6) separate Notices of Appeal that Petitioner filed in the Gwinnett County State Court, Petitioner failed to designate the Letter as a document to be included in the record on appeal. (Resp. App. H, 39a–41a). Respondent further argued that, even if the Georgia Court of Appeals considered the Letter, the Letter failed to meet the requirements of a notice of appeal under Georgia law. (Resp. App. H, 41a–45a). On April 18, 2019, the Georgia Court of Appeals denied Petitioner’s Motion for Reconsideration. (Resp. App. C, 3a).

Petitioner then filed a Request for Permission to File Second Motion for Reconsideration, reiterating that the Letter was a timely filed Notice of Appeal. (Resp. App. I, 49a). In her Request, Petitioner did not invoke any federal law or allege any denial of due process of law. (*See* Resp. App. I). The Georgia Court of Appeals denied Petitioner’s Request for Permission to File Second Motion for Reconsideration on May 22, 2019. (Resp. App. B, 2a).

Thereafter, Petitioner filed a Notice of Intention to Apply to the Supreme Court of Georgia for a Writ of Certiorari. (Resp. App. J, 56a). However, Petitioner’s Petition for a Writ of Certiorari was not timely and properly filed in the Supreme Court of Georgia because Petitioner did not pay the filing costs or supply a sufficient pauper’s affidavit. (Resp. App. J, 53a–54a). Petitioner requested an extension of time to file her Petition for Writ of Certiorari due to “extenuating circumstances,” namely, her then-attorney’s failure to pay the filing costs on her behalf. (Resp. App. J, 53a). Petitioner again did not invoke any federal law or allege any denial of due process of law. (*See* Resp. App. J). The Supreme Court of Georgia denied Petitioner’s request for an extension of time to file a Petition for Writ of Certiorari on October 3, 2019. (Resp. App. A, 1a).

On October 8, 2019, Petitioner filed in this Court an Application requesting an extension of time to file a petition for a writ of certiorari. The extension request was approved by the Court on February 19, 2020, and Petitioner filed a Petition for Writ of Certiorari on March 1, 2020. In her Petition, Petitioner makes a great number of factual allegations which find no support in the record of proceedings in

the state court action and which are otherwise demonstrably false. However, these factual allegations are irrelevant for purposes of the Petition, whether true or not, for the reasons set forth below.

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### **THE PETITION SHOULD BE DENIED**

Petitioner fails to present any compelling reason to grant her Petition for a Writ of Certiorari. The claims asserted in the Petition do not satisfy any of the considerations identified in U.S. Supreme Court Rule 10 because neither the Supreme Court of Georgia nor the Georgia Court of Appeals decided any question of federal law. Although Petitioner attempts to bring this case under this Court's purview by invoking, for the first time, the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution, no federal constitutional claims were raised or ruled upon in the Georgia state courts. In her Petition, Petitioner seeks to relitigate matters finally resolved in the Georgia state courts based solely upon the application of state law. The Petition for a Writ of Certiorari has not set forth any compelling reason for this Court to grant review. Accordingly, the Petition for a Writ of Certiorari should be denied.

#### **I. Petitioner Did Not Raise Any Federal Questions in the Georgia State Courts, and None Were Decided There.**

Under 28 U.S.C. § 1257(a), this Court may review on a writ of certiorari final state court judgments where the validity of a federal statute is challenged, the validity of a state statute is challenged on the ground of its being repugnant to the

Constitution, treaties, or laws of the United States, or where any “title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of . . . the United States.” In exercising certiorari jurisdiction over a state-court judgment pursuant to § 1257(a), this Court has jurisdiction to consider only those substantial federal questions that have been properly raised and decided in the state court proceedings below. *Cardinale v. Louisiana*, 394 U.S. 437, 438–39 (1969); *Leathe v. Thomas*, 207 U.S. 93, 98 (1908) (“[I]n a case coming from a state court this court can consider only Federal questions, and . . . it cannot entertain the case unless the decision was against the plaintiff in error upon those questions.”).

This Court will not consider federal questions raised for first time in the Supreme Court of the United States. *Cardinale*, 394 U.S. at 438; *Olympia Mining & Milling Co. v. Kerns*, 236 U.S. 211, 215–16 (1915). This rule stems from “the appropriate relationship of this Court to state courts,” a relationship of “peculiar force which should lead us to refrain from deciding questions not presented or decided in the highest court of the state whose judicial action we are called upon to review.” *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434 (1940).

Here, Petitioner asserts for the first time in her Petition for Writ of Certiorari that the Georgia Court of Appeals deprived her of her right to appeal without due process of law in violation of the Fourteenth Amendment to the U.S. Constitution. (See Petition at i, 1, & 4). The Georgia state courts did not adjudicate the federal

constitutional rights asserted by Petitioner for the first time in her Petition. In fact, no federal constitutional claim was raised in, or decided by, the Supreme Court of Georgia or the Georgia Court of Appeals. The Gwinnett County State Court granted Respondent's Motion for Summary Judgment in the personal injury action on purely state law grounds, finding no negligence on the part of Respondent based upon the undisputed facts documented by a Waffle House surveillance video. (Resp. App. E, 5a). The Georgia Court of Appeals did not address any federal constitutional claims and instead dismissed the appeal for lack of jurisdiction as untimely under Georgia law. (Resp. App. D, 4a). In declining to review the decisions of the Georgia Court of Appeals, the Supreme Court of Georgia also did not address any federal constitutional claims. (Resp. App. A, 1a). Accordingly, because no federal constitutional claims were raised or ruled upon in the Georgia state courts, this Court is without jurisdiction to consider such claims in a petition for certiorari review. *See Cardinale*, 394 U.S. at 438; *Leathe*, 207 U.S. at 98. This Court “will not undertake to review what the court below did not decide.” *Walters v. City of St. Louis, Mo.*, 347 U.S. 231, 233 (1954).

**II. Petitioner Fails to Present Any Compelling Reason to Grant Her Petition For Writ of Certiorari.**

“Review on a writ of certiorari is not a matter of right, but of judicial discretion.” U.S. Sup. Ct. R. 10. A petition for a writ of certiorari will only be granted for compelling reasons. U.S. Sup. Ct. R. 10. This Court considers the following reasons justification for certiorari review:

- (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
- (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
- (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

Sup. Ct. R. 10(a)–(c). A petition for a writ of certiorari is rarely granted when the alleged error consists of erroneous factual findings or the misapplication of a properly stated rule of law. Sup. Ct. R. 10.

The Petition for Writ of Certiorari does not set forth any compelling reason for this Court to grant review. Petitioner has not argued, and cannot argue, that this case involves a conflicting decision of a state court of last resort on an important federal question, or an important question of federal law that has not been, but should be, settled by the United States Supreme Court. *See* Sup. Ct. R. 10(a)–(c). As discussed above, this case does not present any federal question, let alone a significant federal question. In her Petition, Petitioner sets forth baseless arguments highlighting her dissatisfaction with the discretionary decisions of the Supreme Court of Georgia and the Georgia Court of Appeals. In large part,

Petitioner argues that the Georgia Court of Appeals should have considered the Letter dated September 11, 2018 as part of the appellate record and construed the Letter as an effective and timely Notice of Appeal. (*See* Petition at 4–8). However, Petitioner’s challenge to the Georgia Court of Appeals’ allegedly erroneous factual findings and purported misapplication of the law do not warrant review on a writ of certiorari. *See* Sup. Ct. R. 10. Petitioner has not set forth any compelling reason as to why this Court should grant review, and, therefore, the Petition for a Writ of Certiorari should be denied.

## CONCLUSION

For the foregoing reasons, Respondent Waffle House, Inc. respectfully requests that this Honorable Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

*/s/ Robert D. Ingram*

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April 6, 2020